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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Preliminary Statement

This action comes before this Court after the case was tried before Judge Murphy and a jury in the Southern District of New York. There was a verdict for the plaintiff in the sum of $7,500.00. After the trial Murphy, J. in an opinion set aside the verdict and dismissed the complaint. On an appeal, the order and judgment of Judge Murphy was affirmed by a 2 to 1 decision of the Court of Appeals for the Second Circuit. There was a majority opinion by Lumbard, J. and a dissenting opinion by Clark, Ch. J.

The Issue

The issue is whether the Trial Court was correct in having set aside the verdict of the plaintiff and having dismissed the plaintiff's complaint, and whether the Court of Appeals was correct in having affirmed the lower Court.

The Evidence

On November 24, 1948 at about noon, the plaintiff went aboard the defendant's ship, the S. S. OREGON, which was moored at a pier in the North River, for the sole purpose of visiting with a member of the ship's crew, and to deliver to that party a package which the ship's crew member would in turn deliver to a mutual friend in France (R. 8). His call at the ship was purely personal and had nothing to do with the ship itself (R. 8, 18). He met his friend, Henry Yves, at the gate (R. 8). He knew that in order to go aboard the ship that he needed a pass (R. 9). The securement of the pass was by pre-arrangement. Yves acted as agent for the plaintiff in the securement of that pass (R. 9, 17, 19, 47).

After arriving at the vessel, he went up the gangway and to the room of Yves where he and Yves had refreshments (R. 11). At about five o'clock, or about five hours after arriving on the vessel, he was about to leave the ship, and he was in a hurry to do so (R. 10, 11, 15, 16).

In leaving the ship he started down a stairway, consisting of about ten or twelve steps, which steps were covered with white canvas. The canvas was clean, and as he descended "the steps looked all right all the way down." He saw nothing loose (R. 12, 24, 25). The canvas was about one-eighth of an inch thick and the stairway had handrails on each side. (R. 12). He did not attempt to use the gangway on which he had boarded the ship. Yves was at the head of the stairway as the plaintiff started

down (R. 13). He looked at the steps and they appeared all right. He was in a hurry (R. 22). He continued to about the fourth step from the bottom when he claimed that the canvas slipped under his foot, and that he fell to the bottom of the stairway (R. 11, 12). However, he admitted that on the day after the accident he did not know how the accident happened (R. 14, 15). As a matter of fact, in Defendant's Exhibit A—the hospital record—this appears in the history: "He is not quite certain of the manner in which he was injured" (R. 15). He stated that while he was lying at the foot of the stairway, he noticed that the canvas at the fourth step from the bottom was hanging, but that the rest of the canvas was all right (R. 13, 14). The canvas covering the stairway was all in one piece.

Henry Yves and Rene Dufy, the bartender on the ship, came down the stairway immediately after the plaintiff had fallen, but they did not fall (R. 25, 29). Exhibits C and D show how the stairway looked (R. 29).

Exhibit B was the pass used by the plaintiff in order to visit his friend on the vessel (R. 20).

Since this appeal is on an abbreviated record, and not on a reproduction of all the exhibits, the contents of the pass are here quoted:

> "No. 4424, French Line, Compagnie Generale Transatlantique, Pier 88, North River, foot of West 48th Street, visitor's pass, company's copy, to be collected at entrance of pier. Date, 24 November, 1948.
>
> "Admit Mr. Kermerac, Joseph, to visit S.S. Oregon, from 9 a.m. to 5 p.m. only, to visit M. Henry.
>
> "The person accepting this pass, in consideration thereof, assumes all risks of accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees or otherwise,

for any injury to his person, or for any loss or injury to his property.

"It is issued upon the express condition that it confers no right to enter the pier or ship unless shown whenever required and is subject to such rules and regulations as the Compagnie Generale Transatlantique may make from time to time." (R. 20, 21)

George Bourdon, the ship's steward, had placed the canvas on the stairway, and had fastened the canvas by the use of tacks, with one tack on each side of the canvas on each step with the tacks running through the canvas and through the hard rubber and into the wood, which formed the permanent tread (R. 30, 31, 32, 53, 54, 58, 59). He had used the stairway between the time he placed the canvas on it, and it had looked in order (R. 55).

Thomas Flood, an employee of the defendant, testified that he was a guard stationed at the pier gate, and it was part of his work to pick up the visitors' passes such as the one involved in this accident. The pass was in two parts—one kept by the guard when the visitor arrived, and the other (Exhibit E) turned in by the visitor when leaving the pier is the part originally kept by the visitor, but which was turned in at the pier gate when he left (R. 34, 35).

Henry Yves, a nurse aboard the S. S. Oregon had known the plaintiff for a long time (R. 36, 37). He and the plaintiff had some wine in his room while they were having something to eat, and the plaintiff had also gone to the ship's bar to have something to drink (R. 37, 38, 39). The stairway was covered with canvas, known as sailing cloth (R. 41, 43, 51). At the time that the plaintiff fell, Bourdon and Dufy were standing at the head of the stairway. Every step looked normal and smooth (R. 52). The canvas was fastened (R. 41, 42). Yves walked down the stairway to the place where the plaintiff was lying immediately after

plaintiff's accident, and the entire stairway looked normal and smooth (R. 44).

Rene Dufy, the barman on the vessel, saw the plaintiff fall from about the third or fourth step from the bottom. He went down the stairway to the plaintiff, and the canvas was all right (R. 62, 64). He had also walked up and down that stairway about ten times that day prior to the accident. The canvas did not slip. It was tight and fitted snugly. (R. 62, 68, 69, 70). He had helped Bourdon put the canvas on the stairway. The canvas was nailed to prevent slipping (R. 66). He used the stairway about ten times a day (R. 73, 74).

POINT I

The Trial Court properly set aside the verdict and dismissed the complaint.

A.

In this case the petitioner was a social visitor and not a business visitor on the respondent's ship. This action happened within the jurisdiction of the State of New York. The question of seaworthiness does not exist in this case. The reason for the petitioner being aboard the ship had nothing to do with the operation of the vessel in any respect. The petitioner was aboard the vessel only for a personal reason, and in no respect was he there on business mutual to him and to the ship.

Under the law, seaworthiness of the vessel plays no part in the rights and duties of the parties in this action. As a matter of fact, the Court eliminated the question of seaworthiness from the case.

The action having happened within the jurisdiction of the State of New York, the law of the State of New York applies.

In New York a social visitor, such as the petitioner, may not recover unless the respondent inflicts injury on a social visitor, or licensee by intentional or wanton acts, or by setting in motion dangerous devices, or by creating, after the licensee is on the premises, a dangerous condition by affirmative acts of negligence.

The record is barren of proof that the respondent is chargeable of any conduct permitting a recovery in this case.

The case of *Donohue* v. *Erie Co.*, 258 App. Div. 1, reversed on other grounds in 285 N. Y. 24, held this principle to which the Court of Appeals took no exception. In that case at page 3 the Court said:

> "As to mere licensees the extent of the obligation of the owners or occupiers of land not chargeable with affirmative negligence is to refrain from inflicting upon such licensees intentional or wanton injury and from setting dangerous devices thereon such as spring-guns or like agencies for the purpose of harming trespassers. (Fox v. Warner-Quinlan Asphalt Co., 204 N. Y. 245.)"

Again in the case of *Meiers* v. *Koch Brewery*, 229 N. Y. 10, 13, the Court said:

> "To come under the implied invitation as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the occupant is engaged. * * * There must be at least some mutuality of interest in the subject to which the visitor's business relates."

In the case of *Vaughan* v. *Transit Development Co.*, 222 N. Y. 79, at 82, the Court said:

> "If plaintiff had had no permission to come on the premises he would have been a trespasser. If he had been there by invitation or on lawful business of

> interest to both parties he would have been an invitee. But he was there by permission, for his own convenience, and his status was that of a bare licensee. (Heskell v. Auburn L., H. & P. Co., 209 N. Y. 86.) Long-continued acquiescence in such use does not become an invitation. The law does not so penalize good nature or indifference nor does permission ripen into right. (Stevens v. Nichols, 155 Mass. 472.)"

One of the leading cases in New York is the case of *Fox* v. *Warner-Quinlan Asphalt Co.*, 204 N. Y. 240, and cited with approval in the case of *Donohue* v. *Erie Co., supra.* In that case at page 243 the principles governing the situation now before this Court was expressed by the Court of Appeals in this manner:

> "The extent of this obligation was accurately stated and fully considered by Judge Gray in Cusick v. Adams (115 N. Y. 55. See cases therein cited.) The principle is now well settled by repeated adjudications, in this country and in England, that where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property, passively, acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence; for such person has taken all the risk upon himself."

and again at page 245, the Court said:

> "It thus appears that as to mere licensees the extent of the obligation of the owners or occupiers of land not chargeable with affirmative negligence is to refrain from inflicting upon such licensees intentional or wanton injury and from setting dangerous devices thereon such as spring-guns or like agencies for the purpose of harming trespassers. (Weitzmann v. Barber Asphalt Co., 190 N. Y. 452.)"

In the case of *Weitzmann* v. *Barber Asphalt Co.*, 190 N. Y. 452, at page 456, the Court of Appeals again gave expression of the rule of law governing this case:

> "As to such persons the well-settled rule is that the only duty of the owners or occupiers of the land is to abstain from inflicting intentional, wanton or willful injuries. (Magar v. Hammond, 183 N. Y. 387; Downes v. Elmira Bridge Co., 179 *id.* 136; Birch v. City of New York, 190 *id.* 397.)"

In the case of *Mendelowitz* v. *Neisner*, 258 N. Y. 181, at page 184, the Court said:

> "Where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property, passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence; for such person has taken all the risk upon himself. Such is the law as expressed in Fox v. Warner-Quinlan Asphalt Co. (204 N. Y. 240, 243) and Sterger v. Van Sicklen (132 N. Y. 499). Toward mere trespassers or bare licensees the rule is well settled that the only duty owing to them by the owner or occupier of land is to abstain from inflicting intentional wanton or willful injuries unless he maintains some hidden engine of destruction, such as spring guns or kindred devices upon his property. (Weitzmann v. Barber Asphalt Co., 190 N. Y. 452; Birch v. City of New York, 190 N. Y. 397.)"

See *Vega* v. *Lange*, 248 App. Div. 521; *Gallagher* v. *Citizens' Water Works*, 278 App. Div. 792, aff'd 303 N. Y. 805.

It might be assumed that a person visiting with the owner of the premises might have right of recovery on the basis of ordinary negligence. Such a party certainly would

have greater rights that one who is merely visiting an employee on the owner's premises, and who is in no way on the premises for any social or business interest of the owner. Yet the cases uniformly hold that except for wanton or willful negligence, or for the maintenance of a trap, or for affirmative negligence created after the arrival on the premises, even one visiting with the owner of the premises may not recover.

The petitioner was a licensee, being only a social visitor. As such he took the premises as he found them, and petitioner cannot recover in the absence of a showing that the respondent maintained a trap, or hidden dangers, upon their premises, and failed to warn petitioner of same (*Dodge* v. *Czarniecki*, 2 N. Y. 2d 897; *Roth* v. *Prudential Life Insurance Company*, 266 App. Div. 872; *Sheingold* v. *Behrens*, 276 App. Div. 973, 275 App. Div. 686, leave to appeal denied 301 N. Y. 816; *Kirkup* v. *Kirkup*, 279 App. Div. 803; *Traub* v. *Liekefet*, 2 A. D. 2d 22; *Wilder* v. *Ayers*, 2 A. D. 2d 354; aff'd 3 N. Y. 2d 725.)

B.

If the question of the petitioner's status is not to be considered on the basis that his rights are controlled by the Law of the State of New York, but that his rights, if any, are to be determined under Maritime law, even then the petitioner has failed to prove an action against the respondent.

Since the status of the petitioner was so definitively stated by Lumbard, J. in the majority opinion (R. 97-100), what Lumbard, J. said, will not here be repeated. Counsel respectfully refers the Court to the opinion of Lumbard, J.

It will be noted in the case of *Gunnarson* v. *Robert Jacob*, 94 F. 2nd 170 (2 Cir. 1938), cert den. 303 U. S. 660 (1938); re-hearing den. 304 U. S. 388, and referred

to by Lumbard, J., the Court was dealing not only with the rights of one who was a licensee aboard the vessel, but also was dealing with the ship's captain and his rights. In that case the right to recover was held to exist so far as the captain was concerned, and it was also held that the captain's son, a licensee, had no rights other than the rights of a licensee.

J. Learned Hand, stated the law as follows:

> "The doctrine is well settled; the relation with its resulting duty arises only when the person who enters the premises does so in the interest of the owner, *or upon some business of his own, of which the owner has notice and to an entry in pursuant of which he consents, directly or indirectly*" p. 171. (Emphasis added.)

In that case the captain's son had, previous to the time of his accident, assisted his father in certain work aboard the vessel. The relationship of the petitioner to the respondent in the present case is much more distant than it was in the case just cited.

In the case of *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, the plaintiff was a carpenter doing work in connection which the loading of the vessel. It was said by Mr. Justice Black that he was "on the ship to enable it to complete its loading for safer transportation of its cargo by water" (409).

In the instant case, the petitioner was aboard the vessel for his own purpose and in no way was there for the furtherance of respondent's business.

Recognizing that the rights of people in different categories aboard a vessel are different, this Court as well as in other cases, recognized the difference in status and rights when in *Pope and Talbot, Inc.* v. *Hawn, supra*, and

in applying the principle of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, expressed the law as follows:

> "Sieracki's legal protection was not based on the term 'stevedore', *but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness*" (413). (italics ours)

It would seem that no other conclusion can be drawn from the language used by this Court than that different people in different relationships aboard a vessel have different rights.

While in the opinion of Clark, Ch. J. there was sought to be drawn an analogy between the petitioner and a seaman, there can it truth be no such analogy. In several of the cases cited by Clark, C. J., as to the rights relating to maintenance and cure, it is fundamental that a seaman is entitled to maintenance and cure, and it is likewise fundamental in our law that a longshoreman or other in such a relationship is not entitled to maintenance and cure. The petitioner stands in neither the relationship of a seaman or a longshoreman.

Recognizing that there are distinctions between the rights of a crew member and a longshoreman, this Court said in *Pope and Talbot, Inc.* v. *Hawn, supra*, "having no contract of employment with the shipowner, he (Hawn) was not entitled to maintenance and cure" (413).

The case of *The Osceola*, 189, U. S. 158, decided in 1903, held that a crew member had the right to recover for unseaworthiness, but denied the right of recovery against the shipowner for negligence.

It seems apparent therefore, that the reasoning of Lumbard, J. is sound and applies to the facts before this Court.

In this case, prior to the trial, counsel for the petitioner stipulated that the issues to be tried concerning the respondent's liability were as follows:

"(b) Was the defendant, its agents, servants and employees negligent?

"(c) Was the plaintiff guilty of contributory negligence? If so, to what extent?

"(d) Is the defendant relieved of liability under the terms of the pass under which the plaintiff boarded the vessel."

In view of the stipulation of counsel at pre-trial, and in view of the failure of petitioner's counsel to have excepted to the Court's charge, the charge as given should not be subject to attack at this time. Negligence was the issue and not seaworthiness.

POINT II

There was no issue which should have been submitted to the jury.

Counsel for the respondent not only does not dispute that every favorable inference should be drawn in behalf of the petitioner, but also that if a question of fact exists, that the case should have been left for the jury's verdict. However no Court, so far as counsel can ascertain, has ever held that merely because an accident happens, the plaintiff presents a jury question.

Were the petitioner's argument to be excepted, every case tried in every District Court would require submission of the case to the jury.

Were the argument to be accepted it would mean that regardless of the legal principles, so long maintained, of the right of a party to recover or the lack of right of recovery

be discarded and the jury would be permitted to speculate on the rights and duties of the parties regardless of the facts. Were the argument to be carried to its ultimate conclusion, even in a criminal case, every case would have to be submitted to a jury. No indictment could be dismissed on trial. Certainly no such thought has been expressed by any Court so far as counsel can determine.

Not only was there evidence coming from the respondent's witnesses that the canvas had been secured by tacks on each side of the canvas on each step, and that before and immediately thereafter the accident, the canvas appeared to be normal and in proper condition, and also that the stairway had been used by one of the witnesses at least ten times on the day of the accident and had been used by other crew members, and that two of the witnesses in descending the stairway immediately after the accident were in no way impeded in their descent and ascent of the stairway, but also the petitioner himself stated that prior to his fall, in looking at the stairway, it appeared to be in proper condition.

There was no evidence that the method of securing the canvas to the stairway was in any way improper.

In the light of the facts in this case, the case should not have been submitted to the jury in the first instance. However, the trial Court, realizing that there was nothing in the record warranting a recovery, was fully justified in setting aside the verdict and dismissing the complaint.

Judge Lumbard speaking for the majority in this case said:

> "In the instant case Kermerac argued that the defendant had breached its duty in failing to notify him that a dangerous condition existed on the stairs. There was no evidence to show that the defendant knew that the stairs were in a dangerous condition.

On the contrary, there was testimony of crew members that the stairs had been used without mishap throughout the day both before and after the accident and that they had noticed nothing unusual.

"The plaintiff, however, maintains that the necessary knowledge could be imputed to the defendant because the tacks used by its servants were clearly inadequate for that purpose. There was no evidence that the tacks were inadeqate. The plaintiff's argument derives solely from a scale drawing of a tack which drawing was in evidence. Standing alone, and in the light of all the surrounding circumstances, this was not enough to permit the jury to draw the inference that the defendant should have known that the condition of the stairway presented a condition of danger to Kermaree of which he should have been warned." (R. 100)

POINT III

The complaint should have been dismissed by reason of the fact that the petitioner had released the respondent of any claim of injury when he accepted the benefits of the pass.

The Court of Appeals found it unnecessary to pass upon the validity of the disclaimer of the liability clause contained in the pass, and it refrained from doing so (R. 100).

Since the Court of Appeals found it unnecessary to decide that issue, counsel will only briefly refer to the pass in the following manner:

The petitioner in this instance was on the respondent's property only by reason of a pass, which was secured by his friend and in behalf of the petitioner. That friend was acting as agent for the petitioner and not for the respondent. The conduct of the petitioner's friend thus became

the conduct of the petitioner and the petitioner is bound by his friend's conduct in relation to the pass.

The case of *Wilder* v. *Pennsylvania R.R.* Co., 245 N. Y. 36, upholds the legal proposition that in accepting the gratuity of a visit from the defendant the plaintiff exonerated the defendant of any possible claims for injury. At page 41 of that case the Court used this language in denying the right of recovery.

> "While using this pass, therefore, she assumed all risks of personal injury."

This case was cited with approval in *Armieri* v. *St. Joseph's Hospital*, 159 Misc. 563, at 564.

See also:

> *Hodge* v. *Rutland R.R. Co.*, 122 App. Div. 142, aff'd 194 N. Y. 570.

POINT IV

Had the verdict not been set aside, the verdict would have been improper because of errors in the Court's charge and refusal to charge.

It will be noted that an exception was taken by counsel for the respondent as follows:

> "Mr. Garvey: I don't remember the exact phraseology, Judge. You gave it in the alternative or paraphrased it when you said that if there is an unreasonable danger existing and the defendant believes that the plaintiff would not discover it, then the jury might find that the defendant was negligent; or, in other words, as you put it, I think if the defendant knew of the dangerous condition and failed to warn the plaintiff. As to that I respectfully except.

"And I don't think you defined negligence, as to what negligence is, Judge.

"The Court: I think I did. I told them about the unreasonable risk—

"Mr. Garvey: And reasonable care?

"The Court: I think I used the words 'reasonable care' too.

"Mr. Garvey: I don't recall it. Other than the exception to the failure to charge pursuant to the requests, I have no other exceptions."

The defendant had made the following requests:

1. The plaintiff was a licensee and the defendant owed him the duty only of refraining from affirmatively doing something in a negligent manner which was the proximate cause of the plaintiff's injuries.
2. The defendant can be liable here only if it was wantonly at fault and that fault was the cause of the plaintiff's injuries.
3. By accepting the pass for admission to the vessel the plaintiff bound himself by the conditions expressed on the pass.
4. Henry was the plaintiff's agent for the purpose of securing the pass and the plaintiff is bound by Henry's conduct in respect thereto.
5. By accepting the pass the plaintiff released the defendant of responsibility for this accident.
6. If the plaintiff was negligent even in the slightest degree he cannot recover in this case.

Request "1" was granted only in part. It should have been granted in full.

Request "3" was granted only as covered in the charge. It should have been granted in full.

Requests "2", "4", "5" and "6" were denied in all respects. The defendant was entitled to have had those requests granted.

CONCLUSION

The dismissal of the complaint after setting aside the jury's verdict was proper, and the order appealed from should be affirmed.

Respectfully submitted,

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